No. 90-712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ED PETER MACK and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION and
ETOWAH COUNTY COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM/ALTERNATIVE MOTION TO DISMISS OF APPELLEE, RUSSELL COUNTY COMMISSION

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Motion To Affirm/Alternative Motion To Dismiss

COMES NOW Appellee, Russell County Commission, and moves the Court to affirm the court below in its ruling that the change of the Russell County Commission in 1979 from a district or semi-district form of operating its road department to a Unit System under the control of the county engineer was not subject to the provisions of Section 5 of the Voting Rights Act, alternatively to dismiss. As grounds for said motion, Appellee states as follows:

1. Those commissioners supervising the various road districts prior to 1979 did not act autonomously, but subordinate to and in aid of the entire ccommission.

2. The duties performed by such commissioners were purely ministerial under Alabama law and subordinate to the county commission.

3. Such commissioners were elected from the county at large, rather than from individual districts.

4. The powers of the county commission to appoint a county engineer and implement a Unit System predate the Voting Rights Act of 1964.

WHEREFORE, PREMISES CONSIDERED, Appellee moves the Court to affirm the court below in its ruling that the change of the Russell County Commission in 1979 from a district or semi-district form of operating its road department to a Unit System under the supervision of the county engineer was not subject to the provisions of Section 5 of the Voting Rights Act of, alternatively, to dismiss this appeal.

Question Presented

Whether a ministerial function performed by an officer answerable to the county commission and elected from the county at large may be transferred to an employee appointed by the same county commission without preclearance under Section 5 of the Voting Rights Act.

Parties In Court Below

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission. This appeal relates only to the claim of Mack and Gosha against the Russell County Commission. Lawrence C. Presley, a resident of Etowah County, has informed the Clerk that he has no interest in this appeal. See No. 90-711.

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Statement of the Case

Appellee totally rejects Statement of the Case submitted by Appellants. Appellants are traveling on a totally false assumption that prior to 1979 each commissioner had complete control of a virtually autonomous district, including a portion of the budget (page 2 of Appellants' Statement of the Case). Based on that assumption, Appellants make the following statement in their Argument:

> ". . . Each member controlled a portion of the budget which he or she could use to bargain with other commissioners for constituent services of all sorts. . . .
>
> ***
>
> "While this case is not about patronage, it is about a similar form of political power: the ability of commissioners to act with relative autonomy . . . ." (Appellant Brief, p. 7)

Prior to 1979, the road department of Russell County operated under a district or semi-district system, that is, with three of the five county commissioners (those commissioners residing in districts outside Phenix City) being personally involved in supervising actual maintenance of county roads in his particular district, i.e. the rural districts outside the city limits.[1] The districts were approximately the same size and contained approximately the same miles of rural roads. (Deposition of John W. Belk, page 20.) The road funds were never divided and the three shops were included in a single road budget always under the control of the county commission. (See pages 6, 7, 9, 10, 12, and 15 of the Deposition of John W. Belk).

During the latter part of 1978 and early 1979, a grand jury of Russell County conducted an investigation involving misuse of county equipment and personnel. As a result, one

[1]The city streets and roads are maintained from separate city and state funds under control of the cities. In fact, 20% of Russell County's share of the State gasoline tax by general and local law goes to the municipalities. (Exhibit 3 to this defendant's Motion for Summary Judgment). Counties may, with consent of the city government, work on city streets. (§23-1-86, **Code of Alabama**, 1975).

of the commissioners was indicted by the grand jury and a recommendation was made that the county adopt what is commonly known as the "Unit System". (Deposition of Charles Adams, page 13; and Deposition of John W. Belk, page 8). Under the Unit System, the county road department is operated without regard to district lines by the county engineer, a professional appointed by and responsible to the county commission. See § 11-6-1, **Code of Alabama,** 1975. The duties of the county engineer are specified by state law (§ 11-6-3 of the **Code**). Such has been the law of the state of Alabama since 1939. (Title 12, § 69, **Code of Alabama,** 1940) It is the system recommended by the State Highway Department and other authorities. (See Deposition of Charles Adams, page 14; The Alabama Law Institute's Handbook for County Commissioners; and a study published by Professor Lansford C. Bell of Auburn University, Department of Civil Engineering, in April 1979).[2]

Following the grand jury's investigation, indictment and recommendation, the legislative representative, Mr. Charles Adams, met with the county commission to apply pressure to adopt the Unit System for operating the county road department. During a meeting on May 18, 1979, the county commission passed a resolution reorganizing the road department under the Unit System "effective immediately". (Page 3 of District Court Order, A-3 of Appellant's Brief).

Following the meeting of the county commission, Mr. Adams introduced House Bill 977, which later became Act No. 79-652. This bill was introduced by Mr. Adams to **prevent** the county commission from deciding at a later date to reverse its resolution of May 18, 1979. (Page 9 of Deposition of Adams).

As a result of a consent decree entered March 17, 1986, in **Sumbry v. Russell County,** CV-84-T-1386-E, the county was redistricted into seven commission districts, three of which have a predominantly black population. Although past discrimination, based on unlawful dilution of black voting

[2]A copy of the pertinent portion of Professor Bell's recommendation was attached as a part of Exhibit 1 to Russell County's response to the Justice Department in the Court below.

strength was alleged, no such finding was entered. Prior to **Sumbry**, the five commissioners, while residing in individual districts, were elected from the county "at large". **Sumbry** divided the county into seven districts and each commissioner is now elected by district. Two of the commissioners Mack and Gosha, (plaintiffs in this case) are black and were elected in 1986.[3]

[3]Districts 4 and 5 respectively. District 4 has 1.3 total miles of county-maintained roads or .2%; District 5 has 73.92 miles of county-maintained roads or 13.8%. (Exhibit 3.B. to defendant's Motion for Summary Judgment).

Summary of Argument

Prior to 1979, three county commissioners of Russell County, elected at large, supervised the maintenance of the county roads. Such supervision, however, was done under the control of the county commission and subordinate to it. Under Alabama law, the county commission (composed of five members) retained the control of such roads and one supervising the maintenance and repair was subordinate to such control and exercised a ministerial function.

Transfer of responsibility for conducting a ministerial function by a local government is not subject to preclearance under Section 5 of the Voting Rights Act. To hold otherwise would virtually strangle every local government subject to the Voting Rights Act.

Argument

I. MINISTERIAL FUNCTION

Appellants have artfully twisted every fact, in an attempt to show that the various districts of Russell County were operated prior to 1979 virtually autonomously, with the commissioner of each district totally in charge with his own budget and the roads and bridges of his district. The attempt by Appellants is purely and simply to divide the county road budget into seven small equal portions and have each one of the commissioners an autonomous officer holding legislative and executive powers. In this way he could, in fact, provide services and conduct "horse trading" with other members of the county commission to secure services. (p. 7 of Appellants' Brief).

From a factual standpoint, this semi or "virtual" autonomous power in the various districts by county commissioners has never been the state law of Alabama, nor has it been practiced in any county. Admittedly, many of the counties had a semi-district or actual district system, whereby a rural county commissioner in his particular district would exercise certain supervisory control over maintenance and repair of county roads in his district. This is an outgrowth of the rural, basically agricultural condition of Alabama in years past. On some occasions the counties were directed to operate under a district system by local law. However, even so, the Alabama Supreme Court has held that statutory duties and powers to supervise construction and maintenance of roads and bridges in a district were "administrative, and subordinate to and in aid of the entire commissioners court." See **Court of Commissioners of Pike Co. v. Johnson,** 229 Ala. 417, 157 So. 481 (1934). In fact, in that case the Supreme Court of Alabama specifically rejected the idea of a local law allowing autonomous or semi-autonomous districts:

> "A careful study of the act of 1932, **supra,** leads us to the conclusion that there was no intention to transfer these governmental powers from the governing body of the county and vest them in

> the commissioner of each district. Such construction would destroy the unity of county government, and set up several rival government units of one man each, which, with undefined powers, would lead to great confusion." 229 Ala. at 419.

By local act of 1936, the legislature created the office of road supervisor for Chilton County, with the power of appointment in the governor. The road supervisor was charged with the duty of "... supervising the construction, maintenance and repairing the public roades...." The supervisor was also required to be a civil engineer. Suit was filed over the question of whether the road supervisor's duties stripped the court of county commissioners of its statutory powers under §1347 of the **Code of Alabama,** 1923 (§ 23-1-80 of the 1975 **Code**). The Supreme Court held:

> "This supervisor is required to be a civil engineer, and his duties and authority in nowise conflict with the general powers of the Court. He is in immediate charge of the construction, maintenance and repair of the roads, but his duties are **purely ministerial, and subordinate** to the court of county commissioners." (emphasis supplied)

Thompson v. Chilton County, 236 Ala. 142, 145, 181 So. 701 (1938).

Under the law of Alabama as it existed in 1923, in 1979, and this very day, the county commission alone exercises control over the roads and bridges of the county. The county commission alone exercises control over the budget process. § 11-8-3 of the **Code of Alabama.** The control exercised by a county engineer, whether by § 11-6-3 of the **Code**, or by virtue of Act No. 79-652, (A-48, Appellants' Brief) is purely ministerial. The functions exercised by a county commissioner under a district system or semi-district system were also purely ministerial. Those functions were simply the same as that carried out by the engineer, and at all times were subordinate to the control of the county commission. See § 23-1-80, **Code of Alabama,** 1975.

Prior to 1979 commissioners, in exercising supervision over maintenance in the three individual rural districts, did so subject and subordinate to the executive and legislative control of the county commission acting as a body. Substitution of a trained civil engineer over that function was no more than substituting one ministerial officer for another through the legislative function of the county commission as a body. The ordinary or routine legislative modification of duties or authority of officials "... probably are beyond the reach of Section 5, even given its broadest interpretation." **Hardy v. Wallace,** 603 F. Supp. 174, 179 (N.D. Ala. 1985).

II. APPLICATION OF LAW

Russell County's adoption of the Unit System was first by resolution of the county commission on May 18, 1979. Therefore, the subsequent act of the legislature of Alabama and its preclearance should not be the primary question. Also, it should be underscored that the authority of the county commission to adopt such a resolution existed long before the passage of the Voting Rights Act of 1964. The actual change did not involve any "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting...." as required by the Voting Rights Act, Section 5, 42 U.S.C. 1973(c). At the time of adoption, the members of the county commission, although required to reside in individual districts, were elected by the county at large. The election procedure itself had been adopted by the United States District Court for the Middle District of Alabama. **Anthony, et al. v. Russell County, et al.,** Civil Action No. 961-E, under decree dated November 21, 1972. The claim that a commissioner represented a particular district in 1979 is inaccurate.

Prior to May 18, 1979, three of the commission districts were rural districts and contained all of the county roads. The other two districts were strictly municipal districts. It was the commissioners from the rural districts who supervised the road shops. On May 18, 1979, the county engineer took over the supervision of the county shops and personnel. Section 5 of the Voting Rights Act applies only to proposed

"changes in voting procedures". **Beers v. United States,** 425 U.S. 130 (1976). The preclearance procedures mandated by Section 5 of the Voting Rights Act "focus entirely on changes in the election process." **McClain v. Lybrand,** 475 U.S. 236 (1984).

The lower court based its ruling on the fact that the three rural commissioners in the pre-1979 operation were elected at large, although the court noted that the county commission itself still retained the control over the roads and bridges and maintenance thereof under § 23-1-80 of the **Code.** However, Appellees respectfully submit that as a ministerial function under Alabama law, and considering the fact that supervision is subordinate to the control of the county commission, regardless of who was selected by the county to exercise that supervisory power over the day-to-day maintenance, change in that function would not be subect to Section 5 preclearance.

Section 5 preclearance was aimed at the election process, the voting process, to protect the rights of minorities, and while Appellee recognizes that this Court has stated that one must look at the potential for discrimination, we respectfully submit that it was never intended by Congress that the change of a ministerial function from a non-professional to a professional on the local government staff be subject to preclearance. The three commissioners who exercised supervisory powers prior to 1979 did so at the sufferance and with the consent of the commission as a whole. They were, in effect, appointed by the commission as a whole. Revoking such appointment, as the commission did on May 18, 1979, did not affect the voting rights, or have the potential for affecting the voting rights of any person in the county. Commissioners were then, and are now, part-time officers. There was no decrease in pay or authority under Alabama law. When one further considers the fact that the commission districts, which were mere residency districts in 1979, have been changed and increased in number by the U.S. District Court in **Sumbry** (all precleared) and are now election districts, it boggles the mind to conceive how one would unscramble the 1979 egg.

Conclusion

If the court were to rule that a change in ministerial functions, or appointment of persons to perform those functions, by a local government was subject to Section 5 preclearance, it would amount to a virtual strangling of county government. Of course, Appellants would have this Court do more. They would have the Court divide the county into a loose confederation of seven virtually autonomous election districts. Such has never been authorized by state law, and was never intended by Congress.

For these and other reasons, Appellee respectfully requests the Court to dismiss the appeal or, alternatively, to affirm.

Respectfully submitted,

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